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TD#14804 MBJ

MIKE DRISCOLL county attorney

January 28,1992

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Hon. Dan Morales Attorney General of Texas Supreme Court Building P.O. Box 12548 Austin, Texas 78711-2548

WN 3 0 92

Attention: Madeleine B. Johnson

Chairman, Opinion Committee

- AND/OR THE COUNTY THE COUNTY PURCHASING RE: IS AGENT REQUIRED TO DEMAND THE PERFORMANCE BOND SET FORTH GOV'T CODE ANN. §262.032(b) TEX. LOC. IF BIDDER/PROPOSAL OFFEROR PERFORMS THE CONTRACT OR DELIVERS THE ITEMS SPECIFIED IN THE PURCHASE ORDER PRIOR TO THE EXPIRATION OF THE TEN DAY PERIOD SET FORTH STATUTE?
- AND/OR THE COUNTY **PURCHASING** IS THE COUNTY AGENT REQUIRED TO DEMAND THE PERFORMANCE BOND SET LOC. GOV'T CODE ANN. §262.032(b) IF THE BIDDER/PROPOSAL OFFEROR PERFORMS THE CONTRACT OR DELIVERS ITEMS SPECIFIED IN THE PURCHASE ORDER AFTER EXPIRATION OF THE TEN DAY PERIOD SET FORTH IN THE STATUTE?
- 3. DOES THE COUNTY AND/OR THE COUNTY PURCHASING AGENT HAVE ANY OBLIGATION TO DEMAND THE BIDDER/PROPOSAL OFFEROR FURNISH THE PERFORMANCE BOND SET FORTH IN TEX. LOC. GOV'T CODE ANN. §262.032(b)? IF SO, IS THE FAILURE TO PERFORM THIS OBLIGATION A CRIME?
- 4. IS THE COUNTY AND/OR THE COUNTY PURCHASING AGENT REQUIRED TO PLACE A PROVISION IN COUNTY CONTRACTS EXCEEDING \$50,000 THAT WOULD MAKE THE FURNISHING OF THE PERFORMANCE BOND PROVIDED FOR IN §262.032(b) A CONTRACTUAL OBLIGATION?
- THE COUNTY AND/OR THE COUNTY PURCHASING ΙF **OBLIGATION** DEMAND THE NOT ANY TO AGENT DOES HAVE

BIDDER/PROPOSAL OFFEROR FURNISH THE PERFORMANCE BOND SET FORTH IN TEX. LOC. GOV'T CODE ANN. §262.032(b), MAY LANGUAGE BE ADDED TO COUNTY BID/PROPOSAL SPECIFICATIONS WHICH SO STATES AND THAT THE COUNTY'S POLICY IS NOT TO DEMAND SUCH BOND?

- 6. IF THE BIDDER/PROPOSAL OFFEROR FULLY PERFORMS THE CONTRACT WITHIN TEN DAYS OF THE SIGNING THEREOF, BUT FAILS TO PROVIDE THE COUNTY WITH A PERFORMANCE BOND AS SET FORTH IN TEX. LOC. GOV'T CODE ANN. §262.032(b), WOULD THE FAILURE TO PROVIDE SAID PERFORMANCE BOND INVALIDATE THE CONTRACT?
- 7. IF THE BIDDER/PROPOSAL OFFEROR FULLY PERFORMS THE CONTRACT AFTER THE EXPIRATION OF THE TEN DAY PERIOD FOLLOWING THE SIGNING OF THE CONTRACT, BUT FAILS TO PROVIDE THE COUNTY WITH A PERFORMANCE BOND AS SET FORTH IN TEX. LOC. GOV'T CODE ANN. §262.032(b), WOULD THE FAILURE TO PROVIDE SAID PERFORMANCE BOND INVALIDATE THE CONTRACT?
- 8. IF THE ANSWER TO QUESTION NUMBER 6 IS "YES", AT WHAT POINT IN TIME WOULD THE CONTRACT BE CONSIDERED INVALID?
- 9. IF THE ANSWER TO QUESTION NUMBER 7 IS "YES", AT WHAT POINT IN TIME WOULD THE CONTRACT BE CONSIDERED INVALID?
- 10. IF THE BIDDER/PROPOSAL OFFEROR FULLY PERFORMS THE CONTRACT WITHIN TEN DAYS OF THE SIGNING THEREOF, BUT FAILS TO PROVIDE THE COUNTY WITH A PERFORMANCE BOND AS SET FORTH IN TEX. LOC. GOV'T CODE ANN. §262.032(b) OR PROVIDES THE PERFORMANCE BOND AFTER THE EXPIRATION OF THE TEN DAY PERIOD, WOULD THIS BE CONSIDERED A BREACH OF THE CONTRACT? AT WHAT POINT IN TIME WOULD THE BREACH BE DEEMED TO HAVE OCCURRED? WHAT WOULD BE THE MEASURE OF DAMAGES FOR SUCH BREACH?
- 11. IF THE BIDDER/PROPOSAL OFFEROR FULLY PERFORMS THE CONTRACT AFTER THE EXPIRATION OF THE TEN DAY PERIOD FOLLOWING THE SIGNING OF THE CONTRACT, BUT FAILS TO PROVIDE THE COUNTY WITH A PERFORMANCE BOND AS SET FORTH IN TEX. LOC. GOV'T CODE ANN. §262.032(b) OR PROVIDES THE PERFORMANCE BOND AFTER THE EXPIRATION OF THE TEN DAY PERIOD, WOULD THIS BE CONSIDERED A BREACH OF THE CONTRACT? AT WHAT POINT IN TIME WOULD THE BREACH BE DEEMED TO HAVE OCCURRED? WHAT WOULD BE THE MEASURE OF DAMAGES FOR SUCH BREACH?

Dear Sir:

H.B. 1627, 72nd Leg., R.S., amended Tex. Loc. Gov't Code Ann. §262.032(b) so as to require, within 10 days after the date of the signing of a contract or issuance of a purchase order following the acceptance of a bid or proposal, the bidder or proposal offeror to furnish a performance bond to the county for the full amount of the contract if that contract exceeds \$50,000. The Harris County Purchasing Agent and Commissioners Court have requested advice on the above-referenced questions which deal with the implementation of this statutory provision.

The problems posed by the amendment are numerous. For example, Attorney General Opinion MW-494 requires counties to use competitive bids for insurance contracts. Many insurance contracts will exceed \$50,000. Since the contract will not be fully performed until the insurance coverage expires, the insurance company would be required under the provisions of \$262.032(b) to have a performance bond in effect for the entire term of the insurance coverage. Thus, in effect, the insurance company would be purchasing its own "insurance policy" to insure its providing insurance coverage to the county. Additionally, the cost of such a performance bond will, inevitably, add considerable costs to the county in acquiring such coverage.

The concern of various Harris County officials and the general public about this amendment is demonstrated in the newspaper article and the newspaper editorial we have enclosed for your review.

Please furnish us with your opinion on the questions presented. A Memorandum Brief is enclosed. In that this amendment is of great public importance and will have a considerable impact on each and every county and taxpayer in the State of Texas, we would appreciate your expediting your reply to these questions.

Sincerely,

MIKE DRISCOLL County Attorney

By ROBERTA LLOYD FREMAUX
Assistant County Attorney

MD:RLF Enclosures